CRIMINAL APPEAL No.470 OF 1988

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Against the judgment and order dated 3rd August, 1988 passed by Sri B.N.Singh, Sessions Judge, West Champaran, Bettiah in Sessions Trial No.173 of 1986.

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Haroon Mian @ Md. Haroon----------Appellant

Versus

The State of Bihar----------Respondent

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For the Appellant : Mr. Neeraj Kumar, Advocate
(Amicus Curiae)

For the State : Mr. Lala Kailash Bihari Prasad,
Sr.Advocate
Public Prosecutor

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P R E S E N T

THE HON'BLE MR. JUSTICE SUDHIR KUMAR KATRIAR

THE HON'BLE MR. JUSTICE SYED MD.MAHFOOZ ALAM

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S.M.M.Alam, J. This criminal appeal has been preferred by the sole appellant Haroon Mian @ Md. Haroon against the judgment and order dated 3rd August, 1988 passed by Sri B.N. Singh, Sessions Judge, West Champaran, Bettiah in Sessions Trial No.173 of 1986 whereby he has been pleased to convict the appellant under Section 302 of the Indian Penal Code (hereinafter referred to as "I.P.C.") and sentenced him to undergo rigorous imprisonment for life. He has further been pleased to convict the appellant under Section 307 of the I.P.C. and sentenced him to undergo rigorous imprisonment for five years. The learned Judge further ordered that both the sentences shall run concurrently.

2. It appears that one Bhola Mian was also charged under Section 302 read with Section 34 of the I.P.C. and was put

on trial but by the impugned judgment, he has been acquitted.

3. The prosecution case, as per the fardbeyan of P.W.8 Sk. Izhar recorded by S.I., Sri K.K. Singh Officer Incharge Purshotampur Police Station on 4.2.1986 at 12.30 hours at village Narkatia within Purshotampur P.S. of West Champaran District, in brief, is that about 4-5 days prior to the occurrence, he had gone to Motihari in connection with his livelihood and taking advantage of his absence, appellant Haroon Mian entered into his house during night hours and tried to outrage the modesty of his wife but on hulla raised by his wife, the appellant fled away. When the informant came back to his house from Motihari his wife narrated the incident to him. Thereafter on the alleged date of occurrence, the informant went towards the house of the appellant to lodge protest with him for his indecent act. The informant met with the appellant at his **Gowash** (cow-shed) situated towards north of the village adjacent west to the road. He made enquiry from the appellant why he had committed such act. It is further stated that on being asked about the incident appellant Haroon mian inflicted dagger blow to the informant and thereafter he started running away towards south of the village from the said place. In the meantime, deceased Md. Murtuza was coming from opposite direction. He tried to obstruct the appellant whereupon appellant gave dagger blow to the said Murtuza which caused injury in his abdomen. On being injured he fell down. On hulla, the elder brother of Murtuza, namely, Sk. Abbas and several persons came there and while Murtuza was being taken to the hospital, on way he succumbed to his injuries. In the meantime, the Sub-Inspector of Police also arrived at the

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place of occurrence. It is further stated that on the instigation of co-accused Bhola Mian (now acquitted), the appellant Haroon Mian had given dagger blow to Murtuza.

4. After recording of the fardbeyan, S.I. Sri K.K. Singh forwarded the same to the Officer Incharge Purshotampur (Mainatand) P.S. where on receipt of the fardbeyan Purshotampur (Mainatand) P.S. Case No.5/86 was instituted. However, the investigation of the case was taken up by Sub-Inspector Sri K.K.Singh at the spot itself who after investigating the case submitted charge sheet against the appellant and co-accused Bhola Mian. On the basis of the charge sheet, cognizance was taken and the case was committed to the Court of Session.

5. After commitment charge under Sections 302 and 307 of the I.P.C. was framed against the appellant who denied the charge and claimed to be tried and so, the appellant along with co-accused Bhola Mian against whom charge under Section 302/34 of the I.P.C. was framed, were put on trial but as stated above, accused Bhola Mian has been acquitted.

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6. The defence of the appellant is that the appellant has been falsely implicated in this case and the fact is that on the alleged date of occurrence, the informant's side had inflicted serious injuries to appellant Haroon Mian and co-accused Bhola Mian for which a counter case under sections 147, 148, 323, 324 and 379 of the Indian Penal Code was instituted on the basis of the fardbeyan of the appellant Haroon Mian. In support of its case, the defence has brought the injury reports of appellant Haroon Mian and Bhola Mian on record besides examining the doctor.

7. In support of its case, the prosecution has examined altogether 12 witnesses, namely, Mokima Khatoon (P.W.1), Sk. Afzal (P.W.2), Sk.Yasin (P.W.3), Sk. Akhtar (P.W.4), Sk. Abbas (P.W.5), Sk. Mustakim (P.W.6), Sk. Azazul (P.W.7), Sk. Izhar (P.W.8), Sk. Farman (P.W.9), Dr. Madan Mohan Prasad (P.W.10), Krishna Kishore Singh (P.W.11) and Jhhigan Yadav (P.W.12). Besides oral evidence, some papers have also been brought on record on behalf of the prosecution which have been taken in exhibit. Ext.1 is the post mortem report, Ext.2 is the fardbeyan; Ext.3 is the seizure list; Ext.4 is the inquest report; Ext.5 is formal F.I.R. and Ext. 6 is the injury report of the informant Sk. Izhar.

8. On behalf of the defence two witnesses, namely, Dr. R.C.S. Verma (D.W.1) and Md. Farman (D.W.2) were examined. D.W.1 has deposed that on 4.2.1986 he had examined appellant Haroon as well as Bhola Mian and on both the persons he had found injuries. According to his evidence, he had found as many as five injuries on the person of appellant Haroon Mian and four injuries on the person of co-accused Bhola Mian. The injuries found on the person of Haroon Mian are as follows:-

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(1) There was a boogie swelling over the left temple.

(2) Lacerated wound over left leg front side with compound fracture, bone protruding and there was bleeding.

(3) Lacerated bleeding wound over right tibia anterior aspect.

(4) Deformity and swelling caused by dislocated left elbow joint.

(5) Tenderness and swelling of left shoulder.

The injuries found by the doctor (D.W.1) on the person of Bhola Mian are as follows:-

(1) Lacerated wound over the front of right leg in the middle of the size 1½" x 1/3" x 1/3" bleeding with exquisite tenderness with fracture of fibula of right leg.

(2) Lacerated irregular wound 1" x ½" x ¼" bleeding over the front of left leg in the upper third with tenderness and with fracture of fibula of the left leg.

(3) Abrasion over the dorsum of left hand swelling and tenderness.

(4) Tenderness and swelling over the back.

With regard to the injuries of appellant Haroon Mian, the doctor (D.W.1) has opined that all the injuries were caused by hard and blunt substance like lathi and injury nos. 1, 2 and 4 were grievous and rest were simple. About the injuries found on the person of Bhola Mian, D.W.1 has opined that all the injuries were caused by hard and blunt substance like lathi and injury nos. 1 and 2 were grievous in nature. D.W.1 has also proved both the injury reports which have been marked Exts. A and A/1.

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9. In order to come to the conclusion that the prosecution has been able to successfully prove the charges levelled against the appellant, I would like to scrutinize the evidence of the prosecution witnesses brought on record. In this regard first of all I would like to see – whether the death of deceased Murtaza was homicidal and so, first of all I would like to discuss the evidence of P.W.10 Dr. Madan Mohan Prasad, who had conducted post mortem on the dead body of deceased Murtuza. His evidence is as follows :-

On 5.2.86 at 11 A.M. he did post mortem examination on the dead body of Md. Murtaza son of Sk. Farman of village Narkatia P.S. Purshottampur, District West Champaran and found the following:

Rigor mortis was present, in the stomach only a small portion of fully digested food was present. On examination, following injuries were found:

One clean margin wound 1 ½" x ¾ x deep cavity on supra pubic area of abdomen a little left to the mid line. The left thigh and sprotum were full of blood. He has further deposed that on dissection, he found the following:- Besides superficial and deep layer of stomach the femoral artery was found badly damaged in the length of about an inch. P.W.10 has opined that the injuries were ante mortem and were caused by some sharp cutting instrument such as dagger. Time elapsed since death from P.M. examination was about 24 hours. He has further opined that the death was caused due to shock and haemorrhage as a result of the above injuries which were sufficient in ordinary course of nature to cause death.

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The evidence of P.W.10 Dr. Madan Mohan Prasad and the post mortem report (Ext.1) clearly establish that the death of Md. Murtaza was homicidal caused by injuries inflicted from sharp cutting instrument like dagger.

10. After coming to the conclusion that the death of Md. Murtaza was homicidal, the question arises for determination – whether there are sufficient evidence on record to believe that the injuries inflicted on the person of the deceased which later on became the reason of his death were inflicted by the appellant. It is the case of the prosecution that while appellant Md. Haroon Mian was running away after inflicting injury to the informant

Sk. Izhar he was intercepted by Md. Murtaza and then this appellant gave a dagger blow to the said Murtaza which later on resulted in his death.

11. It appears that P.W. 2 to P.W.9 have appeared before the trial court as eye-witnesses of the occurrence. Amongst them the informant Sk. Izhar is P.W.8 and first of all, I would like to discuss his evidence. His evidence is as follows:-

The occurrence took place about 11 months before. Time was 10 A.M. He had gone to the house of appellant Haroon to make protest as he had entered into his house in his absence. After going there he enquired from appellant Haroon as to why he had entered into his house with bad intention in his absence which fact was disclosed to him by his wife when he returned back from Motihari. At that time Haroon was not at his house but he was at his **Gowash** (cow-shed)and he made enquiry from Haroon at his **Gowash**. At that time Bhola Mian was also present there. He has further deposed that on hearing complaint, Haroon became angry and he took out a dagger from his waist and attacked him causing injury on his back, front and left armpit. He raised hulla of "Pakaro Pakaro" whereupon Md. Murtaza who was coming from opposite direction, wanted to catch hold of Haroon. At that time Bhola Mian instigated him to inflict dagger blow to Murtaza otherwise both of them would be apprehended by Murtuza. At the instigation of Bhola Mian, appellant Haroon gave dagger blow in the abdomen of Murtaza who fell down. Thereafter Haroon and Bhola entered into the house of Nizamuddin. Abbas (P.W.5), Abdulgani and Azazul (P.W.7) came there and took Md. Murtaza to Hospital on bullock-cart for treatment but on way he died. On arrival of the Investigating Officer, he

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gave his fardbeyan. P.W.2 Sk. Afzal, P.W.3 Sk. Yasin, P.W.4 Sk.Akhtar, P.W.5 Sk. Abbas and P.W.6 Sk. Mustakim all have supported the version of the informant and they all have deposed that they had seen the appellant running away after inflicting dagger blow to the informant and when deceased Md. Murtaza wanted to catch hold of him he was given dagger blow in his abdomen by the appellant. Thus, it appears that P.Ws. 2 to 6 all have supported the case of the prosecution and have corroborated the evidence of the informant made before the court. P.W.1 Mokima Khatoon, who is the wife of the informant, has corroborated this fact that about 4-5 days before the alleged occurrence, the appellants had entered into her house with intention to outrage her modesty in absence of her husband and she had narrated this fact to her husband Sk. Izhar.

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12. It is the case of the prosecution that firstly the appellant had caused injury to the informant by means of dagger. From perusal of the record it appears that for that allegation, the appellant has been charged under Section 307 of the I.P.C. There is further evidence that P.W.8 Sk. Izahar (informant) was treated for his injuries in the hospital. It appears that the doctor who had examined the injuries of Md. Izahar was examined as Court witness No.1 under Section 311 of the Code of Criminal Procedure. His evidence is that on 4.2.1986 he had examined Sk. Izhar (informant) and had found the following injuries:-

(1) An incised cut wound caused by sharp cutting Weapon and Bleeding 1” x ¼” x ¼” over vertex (head).

(2) A linear cut wound ½” x ¼” x ¼” over forehead and bleeding.

He has further opined that both the injuries were simple in nature caused by sharp cutting weapon like dagger. He has proved his injury report which has been marked Ext.6. The evidence of the Court Witness No.1 fully corroborates the evidence of P.W.8 as well as the prosecution case that on the alleged date of occurrence, the informant had also received dagger injuries on his person at the hand of the appellant. Thus, it appears that the manner of the occurrence stands fully proved from the materials available on record.

13. It has been submitted by the learned Amicus Curiae that all the witnesses of the prosecution are not trustworthy witnesses and they can never be eye-witnesses of the occurrence. In this regard, he referred the evidence of P.W.3 made at paragraph 3 and P.W.8 at paragraph 5. He submitted that P.W.3 Sk. Yasin has categorically stated at paragraph 3 that when Murtaza was attacked with dagger at that time no other person was present on that place. He has further submitted that at paragraph 5 P.W.8 has stated that when the accused was running away no one was present at that place and Murtaza was at a distance of 30 to 40 feet and at that time Murtaza was alone. The learned Amicus Curiae also referred his statement that after sustaining injury Murtaza fell down and then he (informant) raised hulla whereupon 30 to 40 persons came at the place of occurrence. The learned Amicus Curiae submitted that the above paragraphs of the evidence of P.Ws. 3 and 8 establish beyond doubt that at the time of occurrence, not a single witness was present at the spot and so, the prosecution witnesses i.e. P.Ws. 2, 3, 4, 5 and 6, who have claimed themselves to be eye-witnesses of the occurrence, cannot be said to be the eye-

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witnesses of the alleged occurrence which goes to show that they are not truthful witnesses. To some extent, the argument of the learned Amicus Curiae appears to be correct but the fact is that all the prosecution witnesses are witnesses of the vicinity and as per evidence of the Investigating Officer (P.W.11), they have their **Bathan** and houses near the place of occurrence and, therefore, their presence at the time and place of alleged occurrence cannot be doubted. Had they been merely chance witnesses then their presence at the place of occurrence would have been doubted. So, I am not in a position to accept this argument of the learned Amicus Curiae.

14. The learned Amicus Curiae has further argued that it is the specific case of the appellant that on the same day and at the same time and place, appellant Md. Haroon and his father Bhola Mian were brutally assaulted by the prosecution party and in this regard the appellant has brought sufficient materials on record by examining the doctor, namely, Dr. R.C.S. Verma (D.W.1) who has deposed that on examination of the body of appellant Haroon Mian and his father Bhola Mian, he had found several injuries on their persons and in this regard he had issued injury reports (Exts A and A/1). He submitted that the deposition of D.W.2 will establish that for the said assault on the appellant and his father, a counter case was instituted. The learned Amicus Curiae submitted that the fact that the appellant Haroon Mian and his father Bhola Mian had sustained injuries on their persons was brought to the notice of the witnesses during cross-examination but no specific explanation has come from their side with regard to the injuries found on the persons of the appellant rather the witnesses showed complete ignorance in this

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regard. The learned Advocate submitted that as per the evidence of the doctor, most of the injuries on the persons of the appellant were grievous in nature and as such, the prosecution was bound to explain the injuries on the persons of the appellant and his father.

15. On behalf of the State, the learned Public Prosecutor argued that the prosecution is bound to explain the injury only when the injury was inflicted to the accused side in course of same transaction. His argument is that the first information report of the counter case will show that neither the informant of this case is an accused nor the deceased Murtaza was made accused in that very case, hence it is difficult to accept that the appellant had received injury on his person in the same transaction. He submitted that there is every likelihood that the appellant might have sustained injuries during chase by the witnesses and the villagers after the alleged occurrence as there is evidence that after the occurrence the appellant fled to the house of Nejamuddin. The learned State counsel submitted that this fact points out that there was possibility that the appellant had sustained injuries on his person after the alleged incident and not exactly at the time of this occurrence. I am of the view that there is sufficient explanation on the part of the State Counsel to believe that in the same transaction, the appellant might not have sustained injuries on his person and so, I am of the view that the prosecution is not bound to explain the injury of the appellant under the above mentioned circumstances. I am, therefore, of the view that the prosecution has succeeded in proving its case beyond all reasonable doubt.

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16. It has been argued by the learned Amicus Curiae that even if it is held that the prosecution has been able to prove its case, on the admitted facts, the conviction of the appellant under Sections 302 and 307 of the I.P.C. is bad in law. He submitted that as per the prosecution case, the appellant firstly inflicted injuries by means of dagger to the informant but the evidence of Court Witness No.1 will show that the said injuries on the person of the informant were never inflicted with the intention of causing death of the informant. He submitted that the evidence of the court witness will show that only two simple injuries rather superficial injuries caused by sharp cutting weapon were found on the person of the informant and so, it cannot be held that these two injuries were done to cause the death of the informant and, therefore, the appellant was wrongly convicted for the offence under Section 307 of the I.P.C. I am of the view that this argument of the learned Amicus Curiae appears to be acceptable specially in the background that there was no intervening circumstance for the appellant not to inflict serious injuries by means of dagger to the informant when admittedly no one was present there at that time and even deceased Murtaza, who was the only person nearer to the informant, was at a distance of 30 to 40 feet. This circumstance goes to show that the appellant had never any such intention to inflict such injuries to the informant to cause his death. The fact that after inflicting some minor injuries to the informant, the appellant started running away instead of inflicting some serious injuries, also supports the contention that the appellant had inflicted injuries to the informant with intention to cause his death. The fact that even after

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being injured the informant was chasing the appellant shows that the appellant was running in fear. All these facts establish beyond doubt that the appellant had no intention to kill the informant and so, I am of the view that the appellant was wrongly convicted under Section 307 of the I.P.C.

17. It has further been argued by the learned Amicus Curiae that the evidence on record shows that when the appellant was running away after inflicting injuries to the informant, he was being chased by the informant and so, he was under fear that if he was caught, he would not be spared by the prosecution side and so, under fear he inflicted only one dagger blow to the deceased Murtaza when Murtaza tried to intercept him. He submitted that this circumstance shows that even at that time when the appellant gave dagger blow the deceased, he had no intention to kill him rather he wanted a safe passage to save himself from the wrath of informant's men and so when he was intercepted he gave only one blow unintentionally. He submitted that since the murder of Murtaza was unintentional, as such the conviction of the appellant under Section 302 of the I.P.C. is bad in law. I am of the view that this argument of the learned Amicus Curiae also has got much weight. The learned Amicus Curiae further argued that on given facts the case falls under section 304 Part II of the Indian Penal Code and in this regard he has placed reliance upon the decision reported in 2000 (4) PLJR (SC) Page 226 (State of U.P.Vrs.Indrajeet @ Sukhatha). He has referred the following lines of paragraph 7 of the said judgment which are quoted below:-

> "……The inevitable consequence which follows should be that apart from any positive motive his being either

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> attributed in this case, or alleged or proved by the prosecution, there is no clinching circumstance or evidence to reasonably establish the culpability of the accused for a charge of murder. Absence of intention to cause the death coupled with the lack of knowledge that death would be inevitably caused on account of the injury would make the offence fall only under Section 304 Part II, I.P.C., and not under Section 302 I.P.C".

18. It appears from the evidence available on record that the appellant had no enmity with the deceased nor he had any motive to commit his murder. The material on record shows that when the appellant was intercepted by the deceased he inflicted Chhura blow in his abdomen. This goes to show that it was never the intention of the appellant to commit the murder of the deceased rather his intention was to rescue himself from being caught by the informant who was chasing him. The material on record establishes that the appellant had genuine fear in his mind that if he was apprehended, he would be badly assaulted and the evidence of D.W.1 establishes that on the same day, the appellant had sustained grievous injuries on his person. Under such circumstance, I am convinced that the injuries inflicted to the deceased by the appellant was never caused with intention to cause his death or with intention that such bodily injury was likely to cause death, and, therefore, I agree with the view of the learned Amicus Curiae that this case falls under Section 304 Part II of the Indian Penal Code and not under Section 302 of the I.P.C. Therefore, I am of the view that the conviction of the appellant under Sections 307 and 302 of the Indian Penal Code requires modification. Accordingly, the conviction of the appellant under Section

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307 of the I.P.C. is altered to Section 324 of the I.P.C. and his conviction under Section 302 of the I.P.C. is altered to Section 304 Part II of the Indian Penal Code. Since Section 304 Part II I.P.C. provides maximum sentence for 10 years whereas Section 324 provides maximum sentence upto 3 years and the appellant has been sentenced to R.I. for life and R.I. for five years, respectively, as such it is essential to modify the order with regard to the quantum of sentence passed by the trial court against the appellant. After giving proper consideration of the background in which the offence of murder was committed by the appellant and the presence of grievous injuries on the person of the appellant as well as on co-accused Bhola Mian caused approximately at the same time when this occurrence took place, I am of the view that the ends of justice will be served by awarding R.I for eight years under Section 304 Part II of the I.P.C. and R.I. for two years under Section 324 of the I.P.C. Accordingly, appellant Haroon Mian alias Md. Haroon is sentenced to undergo R.I. for 8 years under Section 304 Part II of the I.P.C. and R.I for 2 years under Section324 of the I.P.C. It is further ordered that both the sentences shall run concurrently.

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19. With the above modification in the conviction as well as sentence, this appeal is dismissed. The appellant is on bail, as such his bail bond is cancelled and he is directed to surrender before the lower court to serve out the remaining part of his sentence.

20. Let the Secretary, High Court Legal service Committee, Patna, pay a sum of Rs.5000/- (Rupees five thousand) to Mr. Neeraj Kumar, Advocate, for assisting the Court as Amicus Curiae.

21. Let a copy of the judgment be handed over to Mr. Neeraj Kumar, Advocate.

(**Syed Md. Mahfooz Alam, J.**)

Sudhir Kumar Katriar, J.

I agree.

(Sudhir Kumar Katriar, J.)

Patna High Court, Patna
The 14th August, 2008
N.A.F.R. (B.T.)

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